

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 LUIS FRANCISCO SIMO NOBOA,
4 et al.,

5 Plaintiffs,

6 CIVIL NO. 02-2730 (RLA)

7 v.

8 IBERIA LINEAS AEREAS DE ESPAÑA,
9 et al.,

10 Defendants.

11 **ORDER IN THE MATTER OF IBERIA'S WILLFUL MISCONDUCT**

12 Plaintiffs in this case claim that defendant IBERIA LINEAS
13 AEREAS DE ESPAÑA ("IBERIA") has incurred in willful misconduct and
14 thus, it is not entitled to the Art. 25 limitation of liability
15 provisions of the Convention for the Unification of Certain Rules
16 Relating to International Transportation by Air, Oct. 12, 1929, 49
17 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49
18 U.S.C. § 40105 (the "Warsaw Convention").

19 **THE FACTS**

20 Plaintiffs' mother, RAMONA A. NOBOA RUIZ, died in the Dominican
21 Republic on November 24, 2001. Following her last wish to be
22 cremated and buried next to her husband and inasmuch as there were no
23 cremation services available in the Dominican Republic, her children
24 made arrangements with a local funeral home to have her remains
25 embalmed, prepare the necessary documents for transportation to
26 Puerto Rico for cremation and have her ashes returned to the
 Dominican Republic for burial.

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The embalmed body was sent to Puerto Rico via American Airlines Cargo on November 27, 2001 consigned to Professional Mortuary Services. Upon arrival the remains were picked up by ANTONIO J. ABELLAS from Funeraria Belmar Memorial.

Once cremated, on December 1, 2001 MR. ABELLAS handed the box containing decedent's ashes to DAVID RODRIGUEZ-ESCOBAR, a PONCE CARGO representative at the Luis Muñoz Marin International Airport, who received the box on behalf of its principal, IBERIA, and issued the pertinent air waybill. The air waybill noted that human remains (ashes) were being shipped. MR. RODRIGUEZ-ESCOBAR testified that the box was approximately 8 inches high and about 4 or 5 inches wide and that he placed a "fragile" label on it.

Thereafter, MR. RODRIGUEZ ESCOBAR delivered the box to JOSEF LAPESKER, ramp manager for SWISSPORT (now IVYPORT), who in turn handed it over to RAMON ALOMAR, of SWISSPORT. MR. ALOMAR testified in his deposition that he placed the box in Compartment No. 5 of an IBERIA Boeing 747 aircraft bound to the Dominican Republic. The ashes were lost and have never been found.

WILLFUL MISCONDUCT

The Warsaw Convention governs the liability of air carriers involved in the international transportation of both passengers and cargo by establishing a body of applicable uniform rules. The Treaty includes a presumption of air carrier liability as well as a cap on

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2 the liability for lost checked baggage or goods¹ unless the loss
3 resulted from the carrier's "willful misconduct" "in accordance with
4 the law of the court to which the case is submitted." Art. 25(1).
5 Hence, we must examine defendant's conduct under Puerto Rico's legal
6 precedent. See, Ins. Co. of N. Am. v. Fed. Exp. Corp., 189 F.3d 914,
7 919 (9th Cir. 1999) ("If a claim is permitted by the Convention, the
8 analysis of the claim is then governed by the law of the forum"); In
9 re Air Crash off Point Mugu, Calif., on January 30, 2000, 145 F.
10 Supp.2d 1156, 1161 (N.D.Cal. 2001) ("All claims which are allowed by
11 the Convention are then evaluated under the standards of the
12 applicable domestic law."); D'Alessandro v. American Airlines, Inc.,
13 139 F. Supp.2d 305, 307-08 (E.D.N.Y. 2001) ("law of forum
14 jurisdiction, not an international standard of 'dol', determines what
15 conduct constitutes wilful misconduct that deprives a carrier of
16 limited liability protection").

17 The "willful misconduct" standard appearing in the official
18 English translation of the Treaty derives from the term "dol" in the
19 original French version of the Warsaw Convention. In Puerto Rico,
20 following the Civil Law tradition influenced by French principles
21 the concept is locally known as "dolo". It was interpreted by the
22 Supreme Court in Canales v. Pan American World Airways, Inc., 112
23 D.P.R. 329, 340 (1982) as conduct requiring "malice" or "bad faith".
24 According to Canales, there are two components to "dolo", i.e., the

25
26 ¹ Art. 22.

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3 "intellectual" aspect whereby a person is aware that a particular
4 course of conduct is unsound and the "volitional" element whereby the
5 person decides to follow that particular course of conduct. Further,
6 inasmuch as good faith is presumed, it is plaintiff's burden to
7 present sufficient evidence to establish the existence of "dolo".

8 "Dolo" as we find it in the performance of
9 obligations is the obligee's wilful and
10 voluntary failure to comply with his obligation
11 knowing that he is carrying out an unfair act.

12 Canals, 12 P.R. Offic. Transl. at 425.

13 **COMPARTMENT NO. 5**

14 Plaintiffs argue that IBERIA is liable for willful misconduct in
15 that it failed to establish a procedure for transportation of human
16 ashes and that it even failed to follow the procedure applicable to
17 the transfer of human remains. Specifically, they contend that IBERIA
18 failed to give advance notice to the cargo personnel in the Dominican
19 Republic that the ashes were on their way to ensure they were given
20 differential treatment, i.e., special measures taken to retrieve them
immediately upon arrival.

21 According to the evidence on record, IBERIA had a procedure in
22 place for the transportation of human remains in a coffin, diplomatic
23 documents as well as valuable and perishable goods. This procedure
24 consisted in placing a particular code in an operational telex sent
25 to the point of destination prior to the aircraft taking off. The
26 initials DIP were used for diplomatic cargo and HUM for human

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2 remains. This telex allowed the agents at the receiving end to
3 ensure these items were retrieved first.

4 In this particular case even though the air waybill prepared by
5 MR. RODRIGUEZ-ESCOBAR, the PONCE CARGO representative who initially
6 received the box from the funeral home, had a note describing the
7 cargo as "HUMAN REMAINS (CENIZAS)"² the IBERIA agents in San Juan did
8 not include any reference to the HUM code in the corresponding
9 operational telex. By the time JESUS SANTOS RICHARDSON, IBERIA's
10 Cargo Agent in Santo Domingo, reviewed the flight manifest and
11 realized that human remains were being transported, Compartment No.
12 5 was empty. A search in the other cargo holds also proved futile.

13 According to plaintiffs, by failing to forward the notice in the
14 advance operational telex, IBERIA "committed an intentional act
15 knowing that it would probably result in injury because [it] acted
16 with reckless disregard of the consequences of its actions." Motion
17 Regarding Willful Misconduct (docket No. 57) p. 7.

18 Under the circumstances present in this case we find that not
19 including the HUM code in the corresponding operational telex does
20 not denote either a deliberate intention to cause damage or conscious
21 awareness of its detrimental consequences on the part of IBERIA
22 and/or its agents. JOSE A. TRAVERSO SOÑE, head of Cargo Sales for
23 IBERIA in Santo Domingo, testified that there are no special code
24 requirements regarding human ashes. Rather, the HUM code applies only

26 ² The Spanish word "cenizas" translates into English as "ashes".

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3 to human remains shipped in coffins pursuant to IATA regulations and
4 is not applicable to human ashes transported after cremation. In
5 addition, MR. TRAVERSO SOÑE testified that Compartment No. 5 is the
6 safest one on board the aircraft, where important and valuable items
7 are stored and is the first one opened upon arrival.

8 The facts in this case establish that the ashes in question were
9 indeed placed in Compartment No. 5, the smallest compartment in the
10 airplane. Also, it is the first one to be opened upon arrival and
11 where valuable or otherwise special cargo such as diplomatic
12 materials and jewelry are designated for transportation.

13 Plaintiffs claim there is an issue of fact as to whether, in
14 fact, the box containing decedent's ashes was placed in Compartment
15 No. 5 by relying solely on the testimony of LAPESKER who indicated in
16 his deposition that it had "probably" been placed in either
17 Compartment No. 3 or No. 4. However, not only was LAPESKER uncertain
18 as to the specific compartment³ but most importantly, he had no
19 personal knowledge regarding its location. LAPESKER testified he
20 turned over the box to ALOMAR who in turn placed it inside the
21 aircraft. However, LAPESKER acknowledged that all he saw was ALOMAR

22 ³ When asked in which compartment the ashes had been placed
23 LAPESKER at page 15 of his deposition responded:

24 A. I am not sure if it was three or four.

25 Q. Three or four?

26 A. But probably, it was in one of those two. I am
 thinking it was three....

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2 going inside the airplane with the box and coming out empty handed
3 and thereafter the cargo door was locked. Thus, his testimony on this
4 particular issue is inadmissible.

5 On the other hand, RODRIGUEZ-ESCOBAR testified that he had
6 previously dealt with human ashes and that they were always placed in
7 Compartment No. 5. He also stated that he had handed the box over to
8 LAPESKER with specific instructions that it be placed in Compartment
9 No. 5. Further, RAMON ALOMAR described how he personally placed the
10 box inside the aircraft in Compartment No. 5 and that it was the last
11 item to go inside the cargo area prior to departure.

12 In order for conduct to be regarded as constituting "dolo" it
13 must be more than negligence. There must be a specific intent to do
14 harm. In this particular case special care was given to the
15 transportation of decedent's ashes by ensuring that they were placed
16 in the same compartment as other valuable items which were being
17 shipped. The fact that notice was not given in the operational telex
18 does not transform this omission into willful misconduct.

19 There is no evidence in this case showing "the wilful element,
20 the intentional fault, or the awareness that a nonconforming act was
21 being performed at the sender's considerable risk, accompanied by a
22 reckless disregard of what could probably occur." Canals tr. 429

23 Plaintiffs' reliance on Predscot v. AMR, Inc., 383F.3d 861 (9th
24 Cir. 2004) fares no better. The circumstances present in that case -
25 dealing with a demand for decedent to relinquish her breathing device
26 and medication despite specific warnings regarding her delicate

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2 health condition and dependence on them as well as the repeated
3 assurances that they would arrive in the next flight - have no
4 parallel to the facts present in the case before us.

5 **CONCLUSION**

6 Based on the foregoing we find that⁴ IBERIA is entitled to the
7 limitations provided in Art. 25 of the Warsaw Convention and that it
8 is liable to plaintiffs in the sum of **\$736.00** in accordance with Art.
9 22 of the Warsaw Convention.

10 Judgment shall be entered accordingly.

11 IT IS SO ORDERED.

12 San Juan, Puerto Rico, this 22nd day of August, 2005.

13 _____
14 S/Raymond L. Acosta
RAYMOND L. ACOSTA
15 United States District Judge
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25 ⁴ See, plaintiffs' Motion Regarding Willful Misconduct of Iberia
Airlines (docket No. 57); IBERIA's Reply (docket No. 67); plaintiffs'
Motion Supplementing (docket No. 78) and IBERIA's Reply (docket No.
26 80).